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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 375

RAYMOND MARQUEZ and RADAMES MAS,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

RAYMOND MARQUEZ and RADAMES MAS,

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Raymond Marquez and Radames Mas, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered against them on April 7, 1970.

A.

The Opinion Below

On April 7, 1970, the Petitioners' appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C.

Questions Presented

1. Whether certain irrelevant but highly-prejudicial evidence admitted against the Petitioners at the trial below as a result of the Government's successful obfuscation of the critical distinction between the federal and state conspiracies denied the Petitioners a fair trial.

2. Whether the Petitioners were entitled to an instruction requiring the jury to make an initial finding of the existence of the conspiracy and participation in that conspiracy by the Petitioners and one "Firpo" before it could consider certain other highly-prejudicial hearsay evidence.

D.

Constitutional Provisions and Statutes

The Amendments involved are:

Fifth Amendment and Sixth Amendment.

The Statutes involved are:

Title 18, United States Code, Section 1084;

Title 18, United States Code, Section 1952;

Title 18, United States Code, Section 1953;

Title 28, United States Code, Section 1254(1).

E.

Statement of the Case

The trial below was a federal prosecution of a New York State gambling operation, one of the participants of which happened to live in New Jersey. Petitioners Marquez and Mas were indicted for violations of the Interstate Travel Act, Title 18, United States Code, Section 1952 and in a second count for conspiracy to commit such violations. Petitioner Mas was also charged with a violation of Title 18, United States Code, Section 1953 in a third count. The jury found Mas guilty on all three counts and Mas was sentenced to 3 years imprisonment on each count, said terms to run concurrently. Marquez was found guilty only on the conspiracy count, the jury being unable to reach a decision on the substantive count and was sentenced to 5 years imprisonment and a $10,000 fine.

Petitioner Mas was arrested on September 3, 1968 as he was driving his car from his home in New Jersey to New York. Searches conducted that day of Mas, his car, his New Jersey home, and a New York bar called the Sky Club produced various documents later identified as gambling records as well as some $12,000 in cash found in Mas' car. Two of the above-mentioned documents assumed critical importance at the trial. Among the papers found in Mas' home were a "control sheet" bearing the fingerprint of Petitioner Marquez and a letter addressed, "Attention Boss" in regard to some internal dispute and signed, "Firpo".

On May 14, 1969, some 8 months after Mas' arrest, Petitioner Marquez was arrested while driving his automobile in New York City in the company of a friend, Dominick Marcone. A white booklet was taken from Marquez's pocket and a bag containing $9,500 in cash was taken from the car.

ARGUMENT

I.

Certain irrelevant but highly-prejudicial evidence admitted against the petitioners at the trial below. As a result of the Government's successful obfuscation of the critical distinction between the Federal and State conspiracies denied the Petitioners a fair trial.

At the trial below the booklet and money taken at the time of the arrest of Petitioner Marquez was admitted into evidence over objection of both Petitioners. The booklet and the money had no probative value whatever vis a vis the federal gambling conspiracy for which the Petitioners were charged but was highly prejudicial with respect to both Petitioners.

The only evidence offered at the trial below even remotely tending to prove that this New York local gambling operation violated federal law was the fact of Petitioner Mas' New Jersey residence.

Mas was arrested on September 3, 1968 and whether or not his arrest marked his withdrawal from the alleged conspiracy, it is nevertheless clear from the trial record that subsequent to September 3, 1968 there was no further proof offered by the Government of any further violation of federal law.

As the Court stated in *Fiswick* v. *United States*, 329 U.S. 211, 216 (1946), the overt acts averred and proved "marked the duration, as well as the scope, of the conspiracy." See also Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum. L. Rev. 957, 1006-07 (1961). Despite the fact that the Government by its own proof limited its case against both Petitioners to events terminating with the arrest of the Petitioner Mas it nevertheless succeeded in introducing into evidence the booklet and money seized some 8 months thereafter. We do not argue here that acts of co-conspirators are inadmissible without a primary showing of conspiracy and participation; we argue here simply that the book and the money seized 8 months after the termination of the federal conspiracy was irrelevant to any issue of fact properly before a federal jury, but that this evidence was of the most highly-prejudicial and inflammatory kind.

In prosecutions under the instant statutes where a state conspiracy and a federal conspiracy must of necessity be comingled and overlap, the federal judiciary must, if the traditional and critical concept of separation between federal

and state authority is to survive, scrutinize with extreme care evidence offered against the accused so as to make certain that the accused in a federal criminal trial can be convicted only of a federal crime. No such effort was made by the Trial Court here. Accordingly, the convictions against both Petitioners should be reversed.

II.

The Petitioners were entitled to an instruction requiring the jury to make an initial finding of the existence of the conspiracy and participation in that conspiracy by the Petitioners and one "Firpo" before it could consider certain other highly-prejudicial hearsay evidence.

At the trial below, in order to prove knowledge of the federal aspect of the conspiracy on the part of Petitioner Marquez, the Government sought to portray Marquez as the leader of the gambling operation from which fact it asked the jury to infer that Marquez must then have known of the interstate activities of his subordinate, Petitioner Mas. The "Firpo letter" was effectively used to prove the truth of its contents, that is, that Marquez was the boss.

There was not one scintilla of evidence offered with respect to the existence of "Firpo" through the whole of the trial with the exception of the signature on the letter. Furthermore, without the "Firpo letter" there was insufficient evidence tending to prove that Marquez had ever participated in or in any way joined the conspiracy indicated by the documents found in the Mas residence with the single exception of the Marquez fingerprint. Since the letter was ultimately used by the Government to prove the truth of its contents, it constituted hearsay as to both Petitioners

and under *Glasser* v. *United States*, 315 U.S. 60 (1941), "Such declarations are admissible . . . only if there is proof *aliunde* that he is connected with the conspiracy . . . Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Glasser, supra*, at 74-5.

The trial record is barren of any specific finding by the Trial Court that such proof *aliunde* the "Firpo letter" had been introduced sufficient to justify the admission of this hearsay against either Petitioners, although the Trial Court did comment generally during colloquy between summations that his rulings implicitly indicated such a finding.

During the above colloquy, Marquez's counsel asked the Trial Court to instruct the jury that it could not consider the evidence seized from Mas on the question of the guilt of Marquez unless and until it had first found the existence of a conspiracy and that the Petitioners were co-conspirators.

While it is clear that some findings of the existence of the conspiracy and membership be made prior to the consideration of co-conspirators' declarations by the Trial Court, the quantum of proof that must be met by the Government to sustain such a finding remains undefined and uncertain. Furthermore, the right of the defendant to the above instruction is a question of some controversy among the Circuit Courts of Appeal.[1]

1: The defendant not entitled to the instruction: *United States* v. *Nuccio*, 373 F. 2d 168 (2nd Cir. 1967); Contrary to *Nuccio*: See *Schmiller* v. *United States*, 143 F. 2d 544 (6th Cir. 1944); Cases in which the limiting instruction was found proper: *United States* v. *Grow*, 394 F. 2d 182 (4th Cir. 1968); *United States* v. *Kahn*, 381 F. 2d 824, 839 (7th Cir. 1967); *Fabian* v. *United States*, 358 F. 2d 187, 192 (8th Cir. 1966), cert. den. 385 U.S. 821; *Reistroffer* v. *United States*, 258 F. 2d 379 (8th Cir. 1958), *cert. den.* 358 U.S. 927; *Bentar* v. *United States*, 209 F. 2d 734 (9th Cir. 1954).

The issue raised by the introduction of the "Firpo letter" is far more than a question of a minor rule of evidence; the issue raised is in fact the denial of the Petitioners' Sixth Amendment rights of confrontation and trial by jury. Had "Firpo" been placed on the stand at the trial below and had he refused to testify claiming his Fifth Amendment privilege, clearly the Government would not have been allowed to introduce the "Firpo letter". *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965). Where the determination of a question of fact is required before hearsay can be considered by the jury and where the consequences of that determination of fact are the diminuation and attrition of the accused's right to confront the witnesses against him, that determination of fact must be made beyond a reasonable doubt[2] and by a jury. The requested instruction would have granted the Petitioners these rights and the Trial Court's refusal to so instruct the jury constituted error, requiring that the convictions obtained as a result of this denial be reversed.

CONCLUSION

For the reasons here and above set forth this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners
Raymond Marquez and Radames Mas

2. The standard of reasonable doubt is now clearly a constitutional prerequisite in a criminal proceeding. In Re Winship, No. 778, Oct. Term 1969, decided March 31, 1970, U.S. , 25 L. Ed. 2d 368.

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 627, 628—September Term, 1969.

(Argued March 13, 1970 Decided April 7, 1970.)

Docket Nos. 34218, 34219

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND MARQUEZ and RADAMES MAS,

Appellants.

Before:

SMITH, KAUFMAN and HAYS,

Circuit Judges.

Appeal from conviction of Raymond Marquez and Radames Mas on trial to the jury in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* on charges of conspiracy to travel interstate to further unlawful activity, in violation of 18 U.S.C. §371 and conviction of Mas on substantive counts of interstate travel for such purposes and interstate transportation of gambling paraphernalia, in violation of 18 U.S.C. §§1952 and 1953. Affirmed.

MARY M. KAUFMAN, New York, N. Y. (Albert J. Krieger and Frank Askin, New York, N. Y., on the brief), *for Appellants.*

RICHARD A. GIVENS, Assistant U. S. Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, William B. Gray, Assistant U. S. Attorney, on the brief), *for Appellee.*

SMITH, *Circuit Judge*:

Raymond Marquez and Radames Mas appeal from judgments of conviction on trial to the jury in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge*. Marquez and Mas were charged with crossing state borders to further unlawful activity under 18 U.S.C. §1952, and conspiracy to do the same under 18 U.S.C. §371. Mas was also charged with interstate transportation of gambling paraphernalia under 18 U.S.C. §1953. Five other defendants under the indictment were severed before trial. Mas was found to be guilty on all three counts. Marquez was found to be guilty of Count Two, conspiracy, only. The jury was unable to agree on Marquez' substantive count and a mistrial was declared as to that count. Mas was sentenced to three years' imprisonment and a $5,000 fine on each count, concurrently. Marquez was sentenced to five years' imprisonment and a $10,000 fine. We find no error and affirm the judgments.

The evidence tended to show a complex numbers racket operating out of the Sky Club in New York City. Mas was a New Jersey resident who was found to have kept a control sheet and other gambling materials in his New Jersey home. He was arrested on September 3, 1968 on the New York side of the George Washington Bridge; he was carry-

ing gambling records, an address book, and $18,800 cash. His home was searched the same day yielding a suitcase full of gambling materials, the control sheet, and a letter which became known as the "Firpo letter." Mas had been seen on numerous occasions near the Sky Club, often together with Marquez. Marquez was arrested in his car in New York on May 14, 1969 and a bag on the seat between him and a compatriot, Marcone, was found to contain money and gambling slips resembling in many aspects those seized from Mas' home.

Appellants argue that on the conspiracy counts it was error to admit materials seized at Marquez' arrest, since the federal conspiracy arguably had ended eight months previously at the time of Mas' arrest. They argue that the only evidence of any interstate travel was that by Mas, and this ended at his arrest. Thus, they contend the federal conspiracy to travel across state borders to promote gambling must have ended when the interstate travel ended. We do not agree. Even if the conspiracy ended with the cessation of interstate travel, *acts* of conspirators after the conspiracy may be used to show the fact of the illegal association (as opposed to hearsay declarations of a co-conspirator after the end of the conspiracy). *United States* v. *Bennett*, 409 F.2d 888 (2d Cir.), cert. denied sub nom. *Haywood* v. *United States*, 90 S. Ct. 113 (1969), and *Jessup* v. *United States*, 90 S. Ct. 117 (1969); see *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), cert. denied, 390 U.S. 925 (1968). Here, the items seized from Marquez at the time of the arrest were not hearsay declarations, were probative as to the existence of the allegedly prior conspiracy, and were thus admissible to show the existence of the conspiracy, even if it had already terminated. In

any event, it is not clear that Mas' arrest ended the conspiracy. See *Bennett, supra.* It may also be noted that the substantive crime, section 1952, contemplates interstate travel *followed by* acts in violation of state law.

Next, appellants argue that the conspiracy count against them must fall because there is no direct evidence that Marquez knew of any interstate element. There is, however, circumstantial evidence. Marquez' fingerprints were found on the control sheet in Mas' New Jersey home. Mas' phone called Marquez' 18 times. In the case of leaders of a conspiracy, an inference may be drawn in a proper case that the leader is aware of his underling's out-of-state residence. *United States* v. *Corallo*, 413 F.2d 1306 (2d Cir. 1969); *United States* v. *Barrow*, 363 F.2d 62 (3 Cir. 1966), cert. denied, 385 U.S. 1001 (1967). There is sufficient evidence that Marquez was a leader. He was seen near the Sky Club acting like a leader. And his fingerprints were found on a control sheet which it might be inferred would only be in the hands of the higher echelon. Thus the evidence supports the conclusion of Marquez' knowledge of the interstate element.

Appellants next challenge the admission of the so-called "Firpo letter" which was seized at Mas' home. They argue it was hearsay by an unidentified co-conspirator, "Firpo" about whom there is no independent evidence as to his membership. And they argue that it is hearsay because there is no way to cross-examine Firpo as to the contents. [The letter was addressed: "Attention Boss" and dealt with a payoff difficulty which seemed to arise from bets recorded on the control sheet.] However, it is not clear that this is hearsay since the letter was not used to show the truth of its contents, that is, that a payoff difficulty

actually existed, but rather only as evidence of the existence of a report to some "Boss" of administrative difficulties which were apparently to be settled within a hierarchical structure. See *United States* v. *Nuccio*, 373 F.2d 168 (2d Cir.); *cert. denied*, 387 U.S. 906 (1967). Moreover there was no objection on the hearsay ground, only on the ground of lack of connection and foundation. Attack now is therefore precluded. *Bennett, supra*, 409 F.2d at 898. Finally, appellants urge that this letter could not be considered by the jury in considering the question of membership. We have rejected this argument repeatedly. Independent evidence of membership is needed to ground the judge's decision to *admit* hearsay declarations by co-conspirators, but once admitted, the declarations are available on all issues. *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969).

Next, appellants contend that the court's answers to jury questions were erroneous. At the end of the first day the jury announced it had found Mas guilty on all three counts and that is was divided as to Marquez. Appellants argue that it is inconsistent to find Mas guilty of conspiracy without being able to decide if Marquez was also guilty of conspiracy. This contention must be rejected since Mas could have been found to have conspired with men other than Marquez, and the evidence was sufficient to support such a finding. Appellants argue that instructions allowing the finding of a conspiracy with other men were error since there was no evidence of any interstate conspiracy with other men. They argue that all the evidence showed an intra-New York conspiracy. But Mas' participation, and the evidence thereof, makes the others federal conspirators if they knew of Mas' interstate activity, and the inference

is permissible that they did. Appellants also argue that the court's response to the jury's request for clarification of the meaning of conspiracy by rereading the charge on Count Two, was prejudicial since it did not include the stress on the interstate requirements of the underlying substantive count. However, the jury only asked for the meaning of conspiracy, not a rehash of the elements of the substantive crime, and appellants admit the charge was correct as to conspiracy. We cannot presume the jury forgot the elements of the substantive crime.

Next appellants argue that it was error to let the jury see the entire indictment upon its request. Appellants sought to blot out the name of Albert Elmo Payne, a/k/a Firpo, since there was no evidence that a Firpo existed (he was named as a co-defendant in the indictment). But the trial judge has discretion on submitting the indictment. *Souza* v. *United States*, 304 F.2d 274 (9 Cir. 1962). And it would seem that the information that someone known as "Firpo" existed could not prejudice appellants, since the "Firpo letter" itself proved someone used that pen-name. Although perhaps the judge should have blacked out "Firpo's" name, there is no prejudice shown here.

Next, appellants contend it was error for the judge during the marshalling of evidence to characterize the defense's case as contending that the evidence is consistent with innocence. They cite *United States* v. *Hughes*, 389 F.2d 535 (2d Cir. 1968) to the effect that such a charge shifts the burden of proof to defendants to show innocence. However, in *Hughes*, the court charged that if it found the evidence to be consistent with innocence it should find for defendants, which might be construed as having reference

to a burden on defendants. Here the judge was simply accurately characterizing the defendants' case. The burden of proof was accurately charged in another part of the instructions.

Next appellants argue that the interstate element here was not intended to be within the reach of sections 1952 and 1953. They argue that Mas' New Jersey residence was incidental to the gambling conspiracy, and that the slips he carried over the bridge on the day of the arrest were not in aid of the conspiracy. See *United States* v. *Hawthorne*, 356 F.2d 740 (4 Cir. 1966), *cert. denied*, 384 U.S. 908 (1966) (family move from Indiana to West Virginia held incidental to gambling enterprise and hence no crime under federal law). But here we have sufficient federal criminal flavor in the travel. Mas kept gambling records in New Jersey which created a need for multi-state or federal law enforcement. And the travel was to be reasonably expected as part of the enterprise. *United States* v. *Corallo*, 413 F.2d 1306 (2d Cir. 1969). This is the kind of organized crime on a wide scale that was within Congressional intent in section 1952.

Finally, appellants argue that Mas had to have specific intent to violate the federal law in order to be found guilty of the substantive counts (One and Three). See *Morissette* v. *United States*, 342 U.S. 246 (1952); *Lambert* v. *California*, 355 U.S. 225 (1957). The only intent required in the section, however, is to violate state law or the carrying of gambling paraphernalia as defendant crosses the state line. This is not a case where defendants were unaware of possible law violations.

The judgment of conviction is affirmed as to both appellants.

APPENDIX B

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of April one thousand nine hundred and seventy.

Present:

HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAYMOND MARQUEZ, et al.,

Defendants,

RAYMOND MARQUEZ AND RADAMES MAS a/k/a BIG AL,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

APPENDIX C

Order of the United States Court of Appeals Denying Rehearing

34218-19

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

RAYMOND MARQUEZ AND RADAMES MAS, et al.,

Defendants,

RAYMOND MARQUEZ AND RADAMES MAS, a/k/a BIG AL,

Defendants-Appellants.

A petition for a rehearing for Raymond Marquez and Radames Mas together with a motion in the alternative to stay the issuance of the mandate and to continue bail as to Radames Mas pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied. The issuance of the mandate is stayed for 30 days pending application for certiorari pursuant to the terms of Rule 41(b), Federal Rules of Appellate Procedure. The petition to continue Radames Mas on bail is denied, and his bail revoked.

J. JOSEPH SMITH
J. Joseph Smith
IRVING R. KAUFMAN
Irving R. Kaufman
PAUL R. HAYS
Paul R. Ha

Circuit Judges

May 15, 1970

APPENDIX D

Statutes Involved

Title 18, United States Code, § 1952

§ 1952. INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision

of the Secretary of the Treasury. Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212.

Title 18, United States Code, § 1953

§ 1953. INTERSTATE TRANSPORTATION OF WAGERING PARAPHERNALIA.

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event, or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia. Added Pub. L. 87-218, § 1, Sept. 13, 1961, 75 Stat. 492.

Appendix D—Statutes Involved

Title 28, United States Code, Section 1254(1)

§ 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

Title 18, United States Code, Section 1084

§ 1084. Transmission of Wagering Information; Penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wages, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any

State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored. Added Pub. L. 87-216, § 2, Sept. 13, 1961, 75 Stat. 491.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

SUPREME COURT, U. S.

AUG 14 1970

CLERK, SUPREME COURT, U.S.

No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1970

RAYMOND MARQUEZ and KADAMES MAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 375

RAYMOND MARQUEZ and RADAMES MAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1970. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 14, 1970, and on July 10, 1970, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether records seized from each petitioner individually were properly introduced against the other.

STATEMENT

Petitioners seek certiorari to the Second Circuit Court of Appeals to review that court's affirmance of their convictions under 18 U.S.C. 371 (Marquez and Mas) and 18 U.S.C. 1952 and 1953 (Mas only) in the United States District Court for the Southern District of New York. Mas was sentenced to three years' imprisonment and a $5,000 fine on each count, sentences to run concurrently. Marquez was sentenced to five years and a $10,000 fine.

This case involves a complex "numbers racket" which operated out of the Sky Club in New York City and which handled more than $80,000 per day in bets (G. 46).[1] Records of the operation were found at both the Club and the home of Petitioner Mas in Woodcliff Lakes, New Jersey (G. 2-5, 30-32, 62-64, 69). Surveillance disclosed that Mas travelled regularly from his home in New Jersey to the Sky Club (*e.g.*, G. 26-29). When Mas was arrested in his car after crossing the George Washington Bridge from New Jersey to New York City, other gambling records and $12,800 in cash were found in his possession (G. 5-10, 65-67).

The records seized at Mas' home included a master control sheet (G. 63), listing "controllers" in the

[1] References are to the government's appendix in the court of appeals, here designated as "G.".

operation, on which the fingerprints of petitioner Marquez were found (G. 23-25). Surveillance established that Marquez was frequently at the Sky Club, sometimes handing out money (G. 71, Item 1) and seemingly giving instructions (G. 71) in the company of Mas and others (G. 25-30).

When Marquez was arrested on May 14, 1969, a slip of paper on his person (G. 68) contained several notations also found on the master control sheet, on gambling slips seized in Mas' home, and on the address book seized from Mas. Between Marquez and a companion in his car was a paper bag containing $9,500 in cash and a note (G. 15-22, 68) referring to "Ray" and "Jim" (mentioned in Mas' address book (G. 65)). On Marquez' person was found a note pad (G. 68) assigning numbers to: "ME", a designation found on the master control sheet (G. 63), "Al" and "Sam", found in Mas' address book (G. 65) and "Teta", found on slips seized in Mas' house (G. 64). All of these materials, seized from Marquez at the time of his arrest, were admitted in evidence.

The "Firpo letter" (reproduced at G. 62), which is the subject of petitioners' second argument, was found at Mas' home (G. 3) in the suitcase which contained the master control sheet (G. 63) on which Marquez' fingerprints were found (G. 23-25). The letter was marked, "Attention Boss," and indicated that a dispute had arisen concerning payments to a bettor who had scored a "hit" (had picked the winning number) on the date covered by the master control sheet. Sums mentioned in the letter matched figures in the master control sheet.

The letter was offered along with a large number of other gambling records obtained from Mas' home (G. 10-15). Defense counsel meticulously examined each item of evidence and raised specific objections to a number (G. 10-11). They made only the general objection of lack of foundation and lack of connection in the case of this letter and a number of other records (G. 12); they first objected on grounds of hearsay in the court of appeals.

ARGUMENT

1. The evidence obtained at the time of the arrest was properly admitted against both defendants. As the court below noted, the money and notebook seized from Marquez were real evidence and not "declarations." Hence, they were admissible without regard to whether the conspiracy had terminated under the rule of *Lutwak* v. *United States*, 344 U.S. 604, 607.

2. The "Firpo" letter was not hearsay. The statement "Attention Boss" was not used to prove that Marquez was the boss as petitioners contend. It was used only to confirm the expert testimony that the master control sheet which was found in the same box and on which Marquez' fingerprint appeared was used in a gambling operation. The letter was simply a circumstance tending to show the nature and existence of the conspiracy. The government relied upon other evidence to prove Marquez' participation (G. 59-60).

Even if the letter were considered to be the declaration of a co-conspirator, the court was not required to instruct the jury that it should not consider the

letter against Marquez unless it first found beyond a reasonable doubt that he was a member of the conspiracy. While some circuits require a jury to find some independent evidence of participation in a conspiracy before considering declarations of a co-conspirator, the better rule and modern tendency is to hold that the issue of adequacy of the proof *aliunde* to connect individual defendants to the conspiracy is for the judge to decide in light of all the evidence. *United States* v. *Nuccio*, 373 F. 2d 168, 173 (C.A. 2), certiorari denied, 387 U.S. 906; *United States* v. *Ragland*, 375 F. 2d 471, 479 (C.A. 2); *Carbo* v. *United States*, 314 F. 2d 718, 736-737 (C.A. 9), certiorari denied, 377 U.S. 953.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted.

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AUGUST 1970.

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